

THE CRIME OF CONSPIRACY

The offence of Conspiracy has, in recent years, appeared with increasing frequency on our criminal dockets, but the recognition of its utility has not eradicated the many difficulties with which it is beset.

The Chief Justice of England as long ago as 1714 gave an opinion of Conspiracy which, in various forms, must often have been repeated by exasperated lawyers. "Actions of Conspiracy," he said, "are the worst sort of actions in the world to be argued from; for there is more contrariness and repugnancy of opinions in them than in any other species of action whatever."¹

Tennyson's famous indictment of the common law of England might, indeed, have been written with some justice of the law of conspiracy. It does appear, at first glance "A codeless myriad of precedent, a wilderness of single instances", but from this wilderness a few general principles can be deduced, and the "myriad of precedent" is not so codeless that it does not provide the modern jurist with some guide in the administration of this complex branch of the law.

The apparent complications involved in a prosecution for conspiracy might have caused it to fall entirely into disuse were it not for the fact that in many cases it is the only method by which the ends of justice can properly be served.

The essence of conspiracy lies in an agreement to do something unlawful or to do something in itself lawful by unlawful means;² no actual crime need have been committed so long as an agreement to commit one can be proven. Thus the plotter can be prosecuted before his evil design has matured into a criminal act. The protection that is thus provided society can be readily understood, but the example only indicates one phase of the importance of the action.

Conspiracy is more frequently employed where a criminal act has been committed by one individual as a result of plans laid by others; it is frequently impossible to convict any but the actual perpetrator of the crime without resorting to the procedure provided by a prosecution for conspiracy.

The "racketeers" of the United States are an example of the type of criminal whose activities can be curbed by this action—in modern gangdom it is seldom the master criminal who

¹ Parker C.J. in *Jones v. Gwynn* (1714), 10 Mod. 214 at p. 219; 88 E.R. 699.

² *Reg. v. Mulcahy* (1868), L.R. 3 H.L. 306.

actually commits the crime and he is usually difficult to connect directly with it; but conspiracy provides the police with a net in which the catspaw and his principal can be dragged together into the same dock.

Conspiracy achieved its greatest prominence in the days when allied with the action for treason it was employed to destroy the King's enemies; the many plotters against the State who flourished particularly in Ireland throughout the late eighteenth and early nineteenth centuries, were frequently brought to book under the conspiracy laws and, in fact, a large portion of conspiracy jurisprudence was provided by the disloyalty of the pro-French or the incaution of the rebel Irish.

The criminal element in conspiracy has, however, not always been recognized; at the time of its inception there was no clear line of demarcation between crime and tort and it was not until the reign of Edward III that the crime of conspiracy became a distinct entity.³

The most apparent difference between this early form of the action and our modern procedure, is that, at first, it was restricted to conspiracies to pervert the course of justice by interfering with jurors and wrongfully accusing a fellow man of a crime; but the more important difference was that in its early form the conspiracy had to come to fruition by the actual doing of a criminal act, before a prosecution could lie.

The first appearance of the modern offence was in the *Poulterers Case*⁴ where "the act of combination" to commit a crime was held to be in itself indictable.

This was soon followed by *Starling's Case*,⁵ which extended the offence to a combination to do a lawful act by unlawful means.

It is upon the foundation of these two cases and cases directly following them that the classic and most often quoted definition of conspiracy in *Mulchan v. The Queen*⁶ was founded.

Wright J. in that case said: "A conspiracy consists, not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only

³ For a review of the historical background see Law of Conspiracy by Hanisson, pp. 3 to 47; *Rex v. Cameron*, [1935] 4 D.L.R. 447.

⁴ (1610), 9 Co. Rep. 55.

⁵ (1675), 82 E.R. 1039.

⁶ (1868), L.R. 3 H.L. 306 at p. 317. See also *Quinn v. Leatham*, [1901] A.C. 492 at 523; *Rex v. Brailsford*, [1905] 2 K.B. 730 at p. 746.

it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object, or for the use of criminal means."

Thus while A, B, and C may go through life carrying with them the same unvoiced criminal intention, so soon as they agree as to the method of carrying it out, they may be prosecuted.

But according to the last part of his definition the agreement must be of such a nature as would "be enforceable if legal, punishable if for a criminal purpose".

This phrase for a time created some obscurity which was only completely cleared away by the judgment of Lord Alverston in *Rex v. Tibbets*,⁷ who comments on the Mulchay definition in the following words.

"It is plain that the very learned Judge was there speaking of a case in which the criminal intention has not been carried into effect, and he says that in such a case the very promise to do—such a promise as would be binding for a lawful purpose—is an act which negatives the suggestion that the matter rests in intention only. He never said that when the unlawful purpose had been carried out no indictment for conspiracy can be maintained unless a concerted action has been preceded by such a contract between the conspirators as if the purpose had been lawful, would have given ground for a lawsuit. His definition is not of conspiracy, but of a kind of conduct which is sufficient to make the concerted action pass from the stage of intention into that of action."

It is thus made clear that when overt acts have been committed it is no longer necessary to analyse the agreement in search of the qualities which would make it "enforceable if legal."

It has furthermore been expressly held in the United States that the overt act sufficient to relieve the Crown from proving the enforceability of the agreement, need not be of itself an unlawful act.⁸

From these definitions two forms of criminal conspiracy appear to exist.

1. Conspiracies which go no further than the unlawful agreement, but go further than mere latent intention.

⁷[1902] 1 K.B. 88 at p. 89.

⁸*Cook v. United States*, (1928), 28 Fed. (2nd) 730.

2. Conspiracies in which some act has been done in pursuance of the unlawful agreement and from which the agreement can be inferred.

The Canadian Criminal Code contains certain express sections dealing with conspiracy.

Sec. 373—provides a penalty of not more than seven years imprisonment for everyone who conspires with another to commit any indictable offence.

Sec. 444—provides the same penalty for conspiracy to defraud the public or to affect the market price of stocks, or of anything else, publicly sold.

Sec. 218—imposes a penalty of not more than two years imprisonment for conspiring by false representation or fraud to induce a woman to commit adultery.

These sections do little more, however, than provide a skeleton outline of the offence and penalties, and the procedural and evidentiary problems to which Parker C. J. in *Jones v. Gwynn*^{8A} doubtless referred, remain, unassisted by any codification, to irritate and stimulate the minds of bench and counsel.

The various phases of a conspiracy prosecution can be most conveniently considered under three separate headings:

1. Where the case should be tried.
2. How the case should be proved.
3. Who may be involved.

1. *Where the Case should be Tried.*—The rules governing venue in conspiracy cases are old and simple though frequently misunderstood.

If the plot has been hatched and the illegal act performed in one jurisdiction, the situation presents no difficulties and the ordinary rules as to venue are applicable.

The peculiarities of the action are illustrated in cases where acts in pursuance of the common unlawful object are committed in more than one jurisdiction.

This phase of the matter has been settled since the case of *Rex v. Bowes*⁹ in 1787. From that case and the many authorities which have followed it, the rule is clear that when overt acts have been committed in furtherance of the conspiracy, in different jurisdictions, the conspiracy is renewed as to all the con-

^{8A} (1714), 10 Mod. 214; 88 E.R. 699.

⁹ As reported in the judgment of Grosse J., in *Rex v. Brissac and Scott*, (1803), 4 East. 164.

spirators at each place where such an act is committed and the case may be tried in any of the jurisdictions where the plot has matured into action, without alleging the place where the conspiracy was originally formed.

In *Rex v. Bowes* "the trial proceeded on this principle. Where no proof of actual conspiracy embracing all the several conspirators was attempted to be given in Middlesex (where the trial took place) and where the individual actions of some of the conspirators were wholly confined to other counties than Middlesex; but still the conspiracy as against all having been proved from the community of criminal purpose and by their joint co-operation in forwarding the objects of it in different places and counties, the locality required for the purpose of the trial was holden to be satisfied by overt acts done by some of them in prosecution of the conspiracy, in the county where the trial was had."

The exact converse of this case is illustrated by the charge of Willes J. to the jury in *Rex v. Cohn*,¹⁰ where a plot had been hatched in England to scuttle a ship, the ship being sunk on the high seas. The learned Judge told the jury that the fact of the agreement having been made within the country gave them jurisdiction, although the overt act was committed somewhere else.

One of the most learned concise discourses on this question is to be found in our own reports. In a supplementary judgment in a case involving a famous political scandal, *R. v. Connolly and McGreevy*,¹¹ Boyd C. covered the entire field. He said inter alia:

"Of course the crime of conspiracy is complete when the agreement to do the wrong thing or to employ the wrong means is made, though there be no act in the execution of the design, and then the place of trial is single and must be where the offence is complete. But if the matter goes beyond intention and agreement and passes into execution in other localities, and then the conspiring mind manifests itself where any overt act is done and the offence is established, extended and continued elsewhere."

The "overt act" necessary to found jurisdiction may be very slight indeed and need not be more than an indication of the existence of the conspiracy. *Rex v. Isbell*¹² is an example

¹⁰ (1864), 4 F. & F. 68 at p. 72.

¹¹ Boyd C. in *Reg. v. Connolly and McGreevy* (1894), 1 C.C.C. 468 at pp. 504 ff.

¹² (1928), 63 O.L.R. 387.

of the slight grounds on which jurisdiction can be founded in such cases. It is there said per Riddell J. A.: "The evidence discloses acts done by Gilbert in furtherance of the conspiracy, in writing to the accused letters of that import. This is sufficient to found jurisdiction."

The advantages of these special rules as to venue will be readily appreciated by anyone who has been associated with criminal prosecutions; particularly in smuggling cases, convictions are frequently difficult to secure in the jurisdiction of the actual offence and too often local sympathies, insufficient to warrant "a change of venue"¹³ exist, and prejudice a case. In conspiracies the Crown can frequently choose its own venue as overt acts in different jurisdictions are by no means a rarity.

2. *How the Case should be Proved.*—McIntosh C. C. J. in *Rex vs Cameron* makes the statement that "There are no special rules of evidence applicable to this crime. . . ." ¹⁴

This statement, coming as it does in the middle of an otherwise able judgment, is some indication of how the very definite and peculiar rules set out in the authorities have been misunderstood.

There are two possible ways of presenting the evidence in a conspiracy case, and which method should be employed depends entirely on the nature of the evidence to be adduced.

If actual evidence of the agreement itself is available, this may be introduced at the outset of the proceedings, and if the parties are then called, the evidence of each is admissible against the others if it be of acts done in pursuance of the common illegal purpose.¹⁵

This method of proof would only be feasible, however, in a very limited number of cases. As has frequently been pointed out, first hand evidence of the illegal agreement itself is difficult to come by; men do not call in a multitude of impartial witnesses when they are discussing breaches of the law. Accordingly conspiracy is most frequently established by inference from the conduct and dealings of a group of individuals.¹⁶

¹³ Canadian Criminal Code, Sec. 884. Crankshaw, pages 1045 to 1048.

¹⁴ [1935] 4 D.L.R. 447 at p. 454 where he said: "There are no special rules of evidence applicable to this crime and it is wholly a question of evidence of participation in a design and not an act as in most crimes, which is sought to be proved."

¹⁵ *Reg. v. Conolly & McGreevy, supra. Rex v. Howard & Webb* (1799), 2 Esp. 719.

¹⁶ *Rex v. Parnell* (1881), 14 Cox C.C. 508 at p. 515. *Reg. v. Mulcahy, supra*, at p. 317. *Reg. v. Connolly and McGreevy, supra*, at p. 491. *Rex v. Duffield* (1851), 5 Cox, C.C. 404 at p. 434. *Rex v. Parsons* (1763), 96 E.R. 222. *Rex v. Murphy* (1837), 8 C. & P. 297 at p. 310; 173 E.R. 504.

In *Rex v. Brisse and Scott*¹⁷ the matter was succinctly stated by Grosse J:

“Conspiracy,” he said, “is a matter of inference adduced from certain criminal acts of the parties, done in pursuance of one criminal purpose in common between them.” To this may be added the words of Rinfret J. in *Paradis v. The King*¹⁸ where he said : “The actual agreement must be gathered from several isolated doings having possibly little or no value in themselves.”

The general rules for adducing the evidence from which this inference is to be drawn, illustrate the peculiarities of conspiracy prosecutions.

The most marked difference between this and other criminal cases is that the evidence changes its character as the case progresses. Co-conspirators may be called; their evidence, when given, may be evidence against themselves only and be inadmissible as against the accused. But as the case develops, if a conspiracy in which the accused was involved is established, then the evidence of each co-conspirator immediately becomes evidence against him if it be of acts in furtherance of the common unlawful object.

The rule has been set out in different language by different authorities and two quotations, one old and one new, will suffice to show that it has remained the same for over a century.

In *Rex v. Murphy*,¹⁹ Coleridge J. said: “From the nature of this charge the evidence must necessarily grow up as the case proceeds. The acts of one party must be given in evidence and then the acts of the other and it may then be shown that the acts fully prove a conspiracy between them.”

The matter was put with the utmost clarity by Graham, J. of the Supreme Court of Nova Scotia, in charging the jury in *Rex v. Sandford* (unreported). He there said *inter alia*:

“Ordinarily the things that a man does and says are only evidence against himself and are not evidence against others who are accused of the same crime; but here, if you find there was such an agreement as that of which I have been speaking (an agreement to smuggle liquor) then the acts and deeds of his fellow-conspirators in pursuance of the agreement are evidence against Sandford. As soon as it appears *prima facie* that such agreements as are alleged against him were entered into by

¹⁷ (1803), 4 East 164.

¹⁸ [1934] S.C.R. 165.

¹⁹ (1837), 8 C. & P. 310; 173 E.R. 504.

him, the acts and admissions in pursuance of such agreement of the person or persons with whom he agreed, as alleged, are evidence against him."

While there are apparently two different methods of proving the case, it is important to appreciate that fundamentally there is no real difference. Whether the case can be established by direct evidence or must of necessity be inferred from surrounding circumstances, the basic rule is the same and has been well expressed by Hotham J. in *Rex v. Salter*²⁰ where he said: "Whenever you lay a sufficient foundation by evidence to go to the jury of several persons having met for the purpose of conspiracy, the declarations of any of the parties made at any time or place relating to the object of the conspiracy was evidence against all."

3. *Who may be Charged.*—It may be thought that this phase of the matter should have been dealt with first, but it must of necessity involve a considerable discussion of the most authoritative recent case on the whole question of conspiracy and that decision is so complete and of such undoubted authority, that a discussion of it is the most fitting "last word" to any consideration of the subject.

The case referred to is *Rex v. Meyrick and Ribuffi*,²¹ in which Lord Hewart L.C.J. sitting with Roche and Humphreys JJ. delivered the judgement of the court.

The facts of the case are worth recounting. The leading figure was Mrs. Kate Meyrick, a well known London Night Club proprietress and the offence charged against herself and Ribuffi, another Night Club owner, was that having both bribed a police officer named Goddard, to "tip them off" as to police raids, they were guilty of conspiracy.

Mrs. Meyrick and Ribuffi were accordingly charged with conspiring together and with another and convicted before Mr. Justice Avory and a jury; from this conviction they appealed.

Sir Henry Maddock carried the appeal for Mrs. Meyrick and almost his first submission went to the heart of the peculiarities of the crime. He submitted with perfect truth that Mrs. Meyrick had never met the people with whom she was said to have conspired until she saw them in the dock. She had never spoken to them and although there might be a conspiracy between Mrs. Meyrick and Goddard, the police officer, on the one

²⁰ (1804) 5 Esp. 125.

²¹ (1929), 21 Crim. App. Rep. 94; 45 T.L.R. 421.

hand, and Ribuffi and Goddard on the other, that was no evidence of common design between Meyrick and Ribuffi. To all of which Roche J. blandly replied, "There was an ingredient of community in the person of Goddard." Sir Henry Maddock, of course, insisted that all the defendants must be cognizant of the objects of the conspiracy and he put before the court a hypothetical case which they do not appear to have answered very fully—he suggested that if he were driving along the road with his headlights out and were stopped by a police officer and he offered him a bribe which was accepted, it would surprise him very much if he found himself in the dock with forty other motorists who had been guilty of similar behaviour—to which his Lordship is reported as replying with seeming irrelevance but doubtless some force: "A motor car is a movable thing. Different considerations apply when you have a number of persons engaged in the same area in doing the same thing." This reply seems somewhat inconsistent with general principles, but in any event "the powerful arguments employed on behalf of the appellant failed".

Lord Hewart explained that there were two types of conspiracy—one he likened to a chain, the other to a wheel.

In the chain type A conspires with B, B with C, etc. In the wheel type, on the other hand, there is a central figure with whom the other members communicate. In either case, if the common unlawful object is apparent the offence is complete.

The Lord Chief Justice is reported as saying:²² "When once it was conceded that for persons to conspire it was not necessary that there should be direct communication between them, it became necessary to look at the circumstances to see if the argument of mutual exclusiveness was satisfactory."

"It had never been suggested by the prosecution that Mrs. Meyrick was in direct communication with Ribuffi but the jury had been asked by the prosecution to find as a fact that Mrs. Meyrick was in communication with Goddard and that Ribuffi was in communication with Goddard, not for a purpose that was individual and special to each, but for a design that was common to all. . . . To find the accused persons or any of them guilty of the conspiracy charged in the indictment, it was not necessary that the prosecution should establish that the individual conspirators were in direct communication with each other, but what had to be proved was that the alleged conspirators had entered into an agreement with a common

²² (1929), 45 T.L.R. at p. 424.

design. In other words, the matter to be ascertained was whether the acts of the accused persons were done in pursuance of a criminal purpose common to all of them."

The report has been quoted at such length because the proposition contained in it is somewhat startling in its implications. It is questionable whether Sir Henry Maddock's *reductio ad absurdum* of the motorist is fully answered in the judgment, but it is difficult to see why he could not be convicted along with any other motorist who bribed the same policeman under similar circumstances, not only on the same night, but any night.

There would be as Roche J. so aptly said an "ingredient of community" in the person of the policeman.

The ill-assorted groups who might have been accused of conspiracy together in prohibition days on the ground that they all employed the same bootlegger, are but one type which suggest themselves as possibly being liable to this all-embracing process.

The Meyrick case did not decide anything new however. The great Parnell found himself involved in a similar net when he was convicted of conspiring to induce tenants not to pay rents to their landlords and in his case, Fitzgerald J. said:²³ "It may be that alleged conspirators have never even seen each other and have never corresponded. One may never have heard of the other and yet by law they may be parties to the same criminal agreement." He then cited a remarkable case of two soldiers of fortune, each engaged on a different side in the American Civil War, who had never seen each other and who returned separately to Ireland to join the Fenians, only to be arrested and tried together for conspiracy.

There are many other authorities to this same effect and the proposition which appears somewhat novel in the language of the Meyrick case is in reality established beyond doubt.

In the final analysis it is in the public interest that the scope of the action should be as wide as it is. The worst type of crime is gang crime and the law as enunciated in *Rex v. Meyrick* seems specially designed to cope with gang operations, however well they are "covered up".

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²³ (1881), 14 Cox C.C. 508.